No. 21,523

IN THE

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS, LOCAL UNION No. 631, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,
Respondent,

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 357, AFL-CIO,
Intervenor.

On Petition for Enforcement of an Order of the National Labor Relations Board

REPLY BRIEF FOR INTERVENOR INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS UNION, LOCAL 357, AFL-CIO

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OPENING STATEMENT

Respondent does not challenge the merits of the National Labor Relations Board Cease and Desist

Order issued against it. Rather, the Respondent argues only that because it considers that certain procedural defenses exist this Court is justified in refusing to issue a decree enforcing the Order of the Board.

INTERVENOR'S REPLY TO ARGUMENT I

In its first of three arguments to this Court, the Respondent advances two propositions:

1. The Carter-Leigon Agreement, recognized and adhered to since 1952 by REECO, was a tripartite contractual preemption of the disputed work in favor of the Teamsters, enforceable in a Section 301 cause of action and, under precedent of the Board and Courts to be regarded either as a preexisting agreed-upon adjustment of the dispute within the policy of volunteerism expressed by Section 10(k), or, at least as removing the Teamster economic action taken to enforce such contract work tasks preemption from the sphere of an unfair labor practice proscribed by Section 8(b)(4)(D), and therefore depriving the Board of jurisdiction to make a Section 10(k) determination as to such work tasks.

2. That when the claim of such contractual preemption of work tasks had been first presented to the Court in a Section 301 suit, the Board should have suspended or dismissed, the Section 10(k) hearing as one not yet ripe for adjudication, to await court determination of the underlying contract issue, since a court determination of non-preemption would have been a condition precedent to the Board's jurisdiction to make a Section 10(k) determination.

The Respondent's first argument has no validity.

The argument is premised on the assumption that the Carter-Leigon Agreement settles any doubt as to assignment of the disputed work in favor of the Respondents, a fact which the Board, fully supported by the entire record herein, found not to be true.

In pertinent part, the Board in its decision in the Section 10(k) proceeding, stated as follows:

> We find, therefore, that the Carter-Leigon agreement does *not* support the Teamsters' claim to composite staffing at the compounds; and, as the Teamsters have no other basis for such claim, we conclude that there is no merit in their contention that they are entitled to any of the work being performed by the electricians at the electrical compounds.

And, the Board further declared:

> In light of these facts we believe the compounds are, in essence, an integral part of the jobsite, and, therefore, under the provisions of the Carter-Leigon Agreement, jurisdiction over the transportation of electrical supplies utilized by the electricians in the performance of their work is vested in the electricians rather than the Teamsters.

Since the Carter-Leigon Agreement did not assign the Respondent composite staffing privileges at the compounds and since the Carter-Leigon Agreement actually gave the work of transporting supplies from the electrical compounds to the point of use to the IBEW, the Respondent's claim that the Carter-Leigon

Agreement is to be regarded as a preexisting agreed upon adjustment of the dispute within the policy of voluntary settlement of disputes expressed by Section 10(k) is, of course, fully self-defeating.

Respondent's alternative claim that the Carter-Leigon Agreement assigns the disputed work to the Respondent there is no unfair labor practice when economic action is taken to enforce the assignment of such work tasks to the Respondent is similarly without validity because, as already demonstrated, the Carter-Leigon Agreement does not make the assignments which the Respondent professes that it does.

Respondent's second proposition quoted *supra* is also without merit. In making its Section 10(k) determination, the National Labor Relations Board clearly did not invade the province of the U. S. District Court for the District of Nevada. Section 10(a) of the Act vests the Board with plenary power to consider all matters necessary to the determination of whether an unfair labor practice is involved, and while the Board as a matter of policy may withhold its consideration of whether an unfair labor practice has been committed until a relevant arbitration award is forthcoming, no case has yet ruled that the Board must stay all its proceedings until the arbitration order is enforced through the courts.

There is good reason for the non-existence of any precedent to the contrary. While it is often in the interests of justice for the Board to withhold its consideration of the merits of an unfair labor practice charge in cases where there is a possibility that arbi-

tration may resolve any question as to the basis for the charge, nothing would be gained and much would be lost in terms of court time, expense and increased delay before a definite ruling on the merits of the case would be handed down if the Board were to automatically withhold its determination of jurisdictional disputes which the Board's enacting legislation specifies must be decided by the NLRB as priority cases. *NLRB v. Radio & Television Broadcasting Engineers Union,* 364 U.S. 573. The Board, of course, has the primary power to render a decision in this "jurisdictional disputes" area of labor law, and it is manifest that the Board can, within its discretion, reject, or decline to wait for, any arbitration award. *Local 1505, I.B.E.W. v. Local 1836, I.A.M.,* 304 F.2d 365, 367 (C.A. 1, 1962); *Carey v. Westinghouse Electric Corp.,* 375 U.S. 261; *Spielberg Manufacturing Co.,* 112 NLRB 1080.

The futility of relying upon bilateral arbitration awards in a trilateral situation is readily apparent. In jurisdictional dispute cases, both unions customarily obtain a favorable award under *their* collective bargaining agreement. Each union then attempts to have *its* award enforced by court action resulting in two conflicting awards and no measureable progress towards resolution of the underlying jurisdictional dispute. The NLRB has been consistent in refusing to give any weight to such bilateral awards in trilateral situations. *Winslow Bros. & Smith Co.,* 90 NLRB 1379 (1950); *NABET,* 105 NLRB 355 (1953); *I.B.E.W.,* Local 4, 129 NLRB 958; *Newspaper and*

Mail Deliverers Union of New York (News Syndicate Co.), 141 NLRB 578.

Respondent's insistence at this level that the NLRB decision is defective because of the existence of respondent's petition in the Federal District Court to enforce its arbitration award is particularly unpersuasive in view of the fact that the District Court itself has refused to proceed and has issued an Order Staying Proceedings in view of the pendency of the NLRB action. (March 9, 1965, *Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 631 v. Reynolds Electrical & Engineering Co., Inc.,* Civil Action File 666.)

INTERVENOR'S REPLY TO RESPONDENT'S ARGUMENT II

Both the intervening Employer and the intervening International Brotherhood of Electrical Workers expended considerable space in their respective opening briefs to this court rebutting Respondent's argument that because neither the original charge nor the amended charge alleged that the Teamsters had engaged in proscribed acts for the purpose of implementing their demand for the assignment of work involving the hauling of electrical materials from the compounds to the point of use the Board was without authority to make a Section 10(k) determination of the issue and also without jurisdiction to determine that the Teamsters violated Section 8(b)(4)(D) as a result of their actions from May 11, 1964, to June 1, 1964, taken to implement the same demand. Because of

the comprehensive discussion already devoted to the argument in the above mentioned briefs and in view of Respondent's failure to raise any significant points not raised in its previous oral and written arguments, it appears sufficient at this time to simply quote from the Trial Examiner's decision of December 27, 1965, dealing with the same argument, which on April 12, 1966, the Board adopted *in toto.*

> The Respondent's second procedural contention is that in the absence of a charge of a Section 8(b)(4)(D) violation filed after the occurrence of proscribed acts, the Board is without power to initiate or render a decision in a Section 10(k) proceeding, or to adjudge the Respondent guilty of a Section 8(b)(4)(D) violation. In support of this contention, the Respondent asserts that the original charge filed herein on May 5, 1964, and the amended charge filed on May 11, 1964, pertain solely to economic action taken by the Respondent during the period April 22 through April 28, supporting its claim in the composite staffing dispute. The Respondent further asserts that the record of the Section 10(k) proceeding, and the Decision of the Board therein, was to the effect that between April 22 and April 28 the Respondent refused to make deliveries to the electrical compounds, actions taken solely in implementation of the Respondent's composite staffing claim and not to enforce its claim to the point of use delivery work. Respondent further contends that since the Board's jurisdiction to make a Section 10(k) Determination must be "triggered" by a strike or threat of strike in violation of Section 8(b)(4)(D) (Citing *Carey v. Westinghouse Electric Corp.,* 375 U.S. 261), and since a

Section 10(k) proceeding must be initiated by a charge focusing upon unfair labor practices which have *already occurred,* the Board's jurisdiction must fail—at least so far as the determination of the delivery dispute is concerned. This is so, contends Respondent, because no charge was ever filed by REECO after occurrence of economic action of May 11 and May 12 which was oriented toward implementation of the claim to the work of hauling electrical materials from compounds to points of use.

The Respondent is quite correct in its assertion that the Board does not act on its motion in initiating a Section 10(k) proceeding, but acts only when it is charged that some person has, prior to the filing of the charge, engaged in an unfair labor practice of striking, or threatening a strike, in order to force or require an assignment of work.

But the Act's requirement of a charge to serve as a predicate for the Section 10(k) proceeding must be construed in conjunction with the well engrained principle that a charge in an unfair labor practice proceeding merely sets in motion the investigatory machinery of the Board—a principle subsumed within the holding of the Supreme Court in *Fant Milling*[19] to which case the Respondent itself alludes.[20]

It seems apparent that investigatory machinery of the Board was set in motion by the charge herein which alleged proscribed conduct to en-

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[19]*N.L.R.B. v. Fant Milling Co.,* 360 U.S. 301.

[20]See *Texas Industries,* 139 NLRB 365. *Lodge 68 of International Association of Machinists,* 81 NLRB 1108, 1113 at note 3.

force Respondent's claim to the disputed hauling and unloading work. The conclusion patently to be drawn from the Section 10(k) notice issued by the Regional Director, is that the investigation conducted under his auspices had revealed the existence of a dispute encompassing not only the hauling work but the composite staffing issue, as well. The amended charge patently, by its terms, related in part the issue of transporting materials from the compound point of unloading to point of use. It was upon these charges and the investigation undertaken by him that the Regional Director noticed the Section 10(k) matter for hearing, and that the allegations of the complaint in the Section 8(b)(4)(D) proceeding were based.

Even granting contrary to findings hereinafter made, that Respondent's economic action during the April 22 through April 28 period was solely in support of its composite staffing claim, it would be a distortion of the intendment of *Fant Milling* to hold that the delivery dispute was of a different class from, or unrelated to, the composite staffing dispute; and the Respondent inferentially concedes, as it must, that the Board had jurisdiction to hear and decide the composite staffing aspect of the Section 10(k) proceeding, which issue Respondent admits was properly before the Board in the Section 10(k) proceeding. It follows that a decision on the merits on that issue is not for the procedural reasons advanced precluded in this proceeding. And it is from this basic jurisdiction vested in the Board both in the Section 10(k) hearing and the unfair labor practice proceeding that the Board derives its jurisdiction to hear and decide the delivery issue

arising, as I have found, out of a jurisdictional dispute between Respondent and IBEW, dichotomous in nature, broader in its totality, than either the delivery issue or the composite staffing issue alone.

Accordingly, on the foregoing premise, I reject Respondent's second procedural defense. I hold that the charge and amended charge herein alleging conduct violative of Section 8(b)(4)(D) served to set in motion investigatory machinery of the Board, that when the investigation revealed conduct proscribed by Section 8(b)(4)(D) occurring prior to the filing of the original and amended charges, and arising out of a course of action related to the conduct alleged as unlawful in the original and amended charges, the requirements of Section 10(k) that an antecedent unfair labor practice give rise to the issuance of a Section 10(k) notice were satisfied. I further find that, accordingly, the Regional Director acted within his authority and power in including the delivery issue as an issue in the Section 10(k) hearing, the Board had jurisdiction to hear and decide the issues in the Section 10(k) hearing, and to render a decision in the result and unfair labor practice proceeding.

INTERVENOR'S REPLY TO ARGUMENT III

As its last argument, Respondent states that "the order is not specific with reference to person, time or place." Respondent does not state any possible grounds for confusion as to how long the order is to apply. Clearly there can be no doubt as to the duration of its implementation. In the case of the cease and desist order, the Respondent is to comply until, if ever, new contractual terms change the status quo; in the case of the designated affirmative action, the Respondent is to post the notice for the specified period of 60 consecutive days.

So far as application of the Order in regard to person or place is concerned, the spirit and letter of the Order is no less uncertain. Simply stated, the Respondent cannot, with anyone or at any place, engage in the proscribed conduct.

The broad Board Order is obviously warranted in the instant case. Respondent demonstrated an intent and proclivity to violate the secondary boycott provisions of the Act by engaging in an extensive and expanding pattern of conduct violative of the Act's secondary boycott provisions and by attempting to force a reassignment of work to Teamsters not only from electricians but also from other crafts as well. The Board has previously found it necessary to utilize a similarly broad order against Respondent in *Teamsters Local Union No. 631 (Reynolds Electrical and Engineering Co., Inc.),* 154 NLRB 67, at page 70.

The courts have many times upheld similar broad orders of the Board in appropriate cases. *NLRB v.*

Teamsters, Local 522 (CA-3; 1961), 43 L.C. ¶17,199, 294 F. 2d 811; *NLRB v. Teamsters, Local 135* (CA-7; 1959), 37 L.C. ¶65,539, 267 F. 2d 870; *Operating Engineers, Local 825,* 1962 CCH NLRB ¶11,552, 138 NLRB 279, enf'd (CA-3; 1963); 48 L.C. ¶18,503, 322 F.2d 478. *Teamsters, Local 728 v. NLRB* (CA-5; 1964), 49 L.C. ¶19,036, 332 F. 2d 693, cert. den. (1964) 50 L.C. ¶19,327, 379 U.S. 913, 85 S. Ct. 261.

Dated, San Francisco, California,
May 27, 1968.

Respectfully submitted,
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